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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

DEBORAH DONOGHUE, Plaintiff, -against- IMMUNOSYN CORPORATION, ARGYLL BIOTECHNOLOGY LLC, DOUGLAS MCCLAIN, JR. AND JAMES T. MICELI, Defendants.	:	Civil Action No. 08-0510 (JM) (WMC) Judge Jeffrey T. Miller Magistrate Judge William McCurine, Jr.

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE TO TRANSFER OR STAY THE ACTION

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MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS, OR IN THE ALTERNATIVE TO TRANSFER OR STAY THE ACTION

Defendants Argyll Biotechnologies, LLC (incorrectly named as "Argyll Biotechnology LLC"), James T. Miceli and Douglas McClain, Jr., by their attorneys, Thelen Reid Brown Raysman & Steiner LLP, submit this memorandum of law in support of their motion for dismissal or, alternatively, for a transfer or stay, of this action based on principles of federal comity and 28 U.S.C. § 1404.

PRELIMINARY STATEMENT

The plaintiff, allegedly a shareholder of Immunosyn Corporation ("Immunosyn"), filed the complaint in this action under Section 16(b) of the Securities Exchange Act in this District on March 19, 2008, eight days after filing the same complaint in the Southern District of New York,[1] and three months after a nearly identical action was filed by another alleged Immunosyn shareholder in the Southern District of New York on December 19, 2007. In all three actions, plaintiffs have asserted derivative claims to recover alleged short-swing profits purportedly received by the defendants in connection with the alleged purchase and sale of Immunosyn shares. Accordingly, the instant action, as the third action filed seeking precisely the same relief for the same alleged injury, can achieve nothing for the real plaintiff in interest – Immunosyn – except to introduce the danger of inconsistent pretrial rulings and potentially to reduce any recovery by Immunosyn due to duplicative attorneys' fee awards. As such, this action should not be permitted to proceed.

Under the first-to-file rule of federal comity, this later-filed action, which involves the same specific transactions, the same parties, and the same causes of action and defenses as the first-filed action, should be dismissed. Moreover, plaintiff's decision to sue initially in New York and then later in California demonstrates the kind of improper forum shopping that further

[1] Plaintiff has now voluntarily dismissed her earlier filed New York Action. As explained *infra*, this appears to be a manipulative attempt at forum shopping.

warrants dismissal under the first-to-file rule. Efficiency concerns also warrant dismissal: in the first-filed action in New York, defendants have already answered the complaint, a preliminary conference was held before the Honorable Thomas Griesa, and discovery has been served. Accordingly, plaintiff's duplicative action in this forum should be dismissed.

Alternatively, this action should be stayed or transferred to the Southern District of New York, either under comity principles or pursuant to 28 U.S.C. § 1404, because duplicative litigation would be wasteful and inefficient. Should the Court decline to dismiss or stay this action, the interests of justice would require transfer to the Southern District of New York.

STATEMENT OF FACTS

Plaintiff, an alleged shareholder of nominal defendant Immunosyn, commenced this action (the "Third-Filed California Action") on March 19, 2008, seeking recovery of alleged short-swing profits pursuant to Section 16(b) of the Securities Exchange Act.[2] Section 16(b) requires certain corporate insiders to disgorge "profits" received in connection with the sale and purchase, or purchase and sale, of the corporation's securities within a six-month period. *See* 15 U.S.C. § 78p(b). Plaintiff filed the same complaint eight days earlier in the Southern District of New York in an action captioned *Donoghue v. Immunosyn Corporation*, Case No. 08-02484 (S.D.N.Y. filed Mar. 11, 2008) (the "Second-Filed New York Action").[3] Both of these complaints are virtually identical to a complaint filed approximately three months earlier by another alleged Immunosyn shareholder in the Southern District of New York in an action captioned *Segen v. Argyll Biotechnologies, LLC*, Case No. 07-11395 (S.D.N.Y. filed Dec. 19, 2007) (the "First-Filed New York Action").[4] In all three actions, the plaintiffs allege that defendants Douglas McClain, Jr. ("McClain") and James T. Miceli ("Miceli") beneficially own more than 10% of the shares of Immunosyn Corporation through their ownership interests in defendant Argyll Biotechnologies,

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[2] A copy of the complaint in the Third-Filed California Action is annexed as Exhibit 1 to the Felder Declaration ("Felder Decl.") submitted with this motion.

[3] A copy of the complaint in the Second-Filed New York Action is annexed as Exhibit 2 to the Felder Decl.

[4] A copy of the complaint in the First-Filed New York Action is annexed as Exhibit 3 to the Felder Decl.

LLC ("Argyll Bio") and related companies. Plaintiffs thus allege that McClain, Miceli and Argyll Bio are liable for short-swing profits purportedly received in connection with certain alleged purchases and sales of Immunosyn shares by defendants and related entities.

More particularly, both plaintiffs allege that certain sales of Immunosyn shares occurring between April 26, 2007 and October 24, 2007, resulted in short-swing profits for the defendants when matched with four "purchases" that allegedly occurred on June 21, 2007, August 23, 2007 and August 24, 2007, within a six-month period of the alleged sales. *See* Decl. Ex. 1, ¶¶ 30-33; Felder Decl. Ex. 2, ¶¶ 28-31; Felder Decl. Ex. 3, ¶¶ 18-40. There are slight differences between the First-Filed New York Action and the Third-Filed California Action, namely:

(1) Although both plaintiffs base their claims on sales made by Argyll Equities, LLC ("Argyll Equities"), an entity owned by defendants Miceli and McClain, only the First-Filed New York Action names Argyll Equities as a defendant.

(2) The First-Filed New York Action alleges additional damages based on gifts of Immunosyn shares to certain "John Doe" defendants by two related companies, Cuxhaven Holdings, Ltd. and Clairsvelle Holdings, Ltd., which, as also alleged in the Third-Filed California Complaint, are owned by Miceli and McClain, respectively. In response to defendants' motion to dismiss these claims, plaintiff Segen has represented that he intends to withdraw or limit the scope of the gift-related claims.

(3) The Third-Filed California Action alleges certain sales transactions that the First-Filed New York Action does not, although both actions cover the same date range. These variations, which go to the quantum rather than the existence of liability, will likely be corrected and conformed through discovery. Such discovery will involve the same documents, witnesses and information in each of the actions. *See* Felder Decl. ¶ 5. Moreover, the facts and circumstances regarding the alleged sales are unlikely to be in dispute.

Notwithstanding these minor variations, the key disputed issue in these actions is the same: whether the four alleged purchase transactions are in fact "purchases" for purposes of Section 16(b) and, if so, whether such alleged purchases occurred within six months of the alleged sales as would be necessary to impose liability on defendants. As alleged in the defendants' answer in the

First-Filed New York Action,[5] the two Argyll Bio transactions on August 23, 2007 were not purchases, but were merely transfers for no consideration effected to correct a clerical error in another transaction. *See* Felder Decl. Ex. 4, ¶¶ 48-54. Further, the June 21, 2007 and August 24, 2007 transactions occurred in connection with agreements between Immunosyn and two individuals who provided consulting services to Immunosyn. Felder Decl. ¶ 5. As alleged in the First-Filed New York Action Answer, the delivery of shares by these consultants constituted rescissions or forfeitures of their agreements, not purchases. Felder Decl. Ex. 4, ¶ 50. Even if such transactions were "purchases," they occurred pursuant to agreements entered into more than six months prior to any of the alleged sales and, therefore, do not subject the defendants to Section 16(b) liability. *Id.* ¶ 51.

These and other defenses will be identical in each of the actions, and each of the actions will involve the identical documents and witnesses, which exist in equal measure in California and on the East Coast.[6] In addition, since the commencement of the First-Filed New York Action in December 2007, the parties participated in a preliminary conference before the Honorable Thomas Griesa on March 20, 2008, defendants submitted an answer and motion for partial dismissal on April 1, 2008, and discovery has been served. Felder Decl. ¶ 6.

Plaintiff Donoghue has now voluntarily dismissed of the Second-Filed New York Action. Her counsel has declined defendants' requests to dismiss or stay this action in favor of proceeding in the Southern District of New York, citing alleged venue defects as the purported reason. This refusal has continued despite Defendants' counsel's assurances that Defendants do not object to venue in the Southern District of New York. *See* Felder Decl. ¶ 7.

Because plaintiff appears to be engaging in manipulative forum shopping, and because a nearly identical, earlier-filed action involving the same parties is already pending in the Southern

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[5] A copy of the answer in the First-Filed New York Action is annexed as Exhibit 4 to the Felder Decl. Defendants' answer in this action, submitted concurrently with this motion, contains identical affirmative defenses.

[6] Relevant documents and witnesses are located in New York, New Jersey, Georgia and California. Felder Decl. ¶ 5. Further, all of the witnesses will be required to travel to New York, where the First-Filed New York Action is already progressing.

District of New York, Defendants seek dismissal of the Third-Filed California Action or, in the alternative, transfer or stay.

ARGUMENT

POINT I

THIS ACTION SHOULD BE DISMISSED, OR, ALTERNATIVELY, TRANSFERRED OR STAYED, PURSUANT TO THE "FIRST-TO-FILE" DOCTRINE OF FEDERAL COMITY

The Ninth Circuit has long recognized the general rule of federal comity that allows a district court to "decline jurisdiction over an action when a complaint involving the same parties and issues has already been filed in another district." *Pacesetter Sys., Inc. v. Medtronic, Inc.*, 678 F.2d 93, 94-95 (9th Cir. 1982) (dismissing action where suit involving same parties and issues had previously been filed in another district). The purpose of this "first-to-file" rule is to promote efficiency, and it "should not be disregarded lightly." *Id.* at 95 (citations omitted). Accordingly, dismissal of a later-filed action is warranted where there is an identity of parties and similarity of issues with the first-filed action.[7] *See Intersearch Worldwide, Ltd. v. Intersearch Group, Inc.*, No. 07-4634, 2008 WL 753731, at *6 (N.D. Cal. Mar. 19, 2008) (dismissing action in favor of earlier-filed action in the Southern District of New York). Further, dismissal, rather than stay or transfer, is warranted where, as here, the court of first filing can provide an adequate remedy. *Id.* at *12 (citing *Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 627-28 (9th Cir. 1991)).

Here, the nominally different shareholder plaintiffs in the California and New York suits are suing derivatively on behalf of the same real party in interest, Immunosyn. *See Lou v. Belzberg*, 834 F.2d 730, 739 (9th Cir. 1987). Moreover, each suit alleges the identical theory of liability based on the same core factual allegations, and each is subject to the same defenses.

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[7] Further, none of the possible exceptions to the first-to-file rule apply here. Such exceptions include instances where: defendants acted in bad faith in filing an anticipatory declaratory judgment suit; defendants engaged in forum shopping in such an action; convenience clearly favors the later-filed district; or the later action has progressed further than the first action. *See Intersearch Worldwide, Ltd.*, 2008 WL 753731, at *9-12. Because none of these exceptions applies, the first-to-file rule governs.

Accordingly, the efficiency goals of the first-to-file rule would be served by dismissal of plaintiff's duplicative Third-Filed California Action.

Further, there can be only one recovery of damages, if any, and therefore there is no benefit to Immunosyn from the pendency of duplicative lawsuits. On the contrary, plaintiff's duplicative action may prejudice Immunosyn – the very party plaintiff purports to represent – by depleting Immunosyn's recovery, if any, with a duplicative attorneys' fee award. Accordingly, the Third-Filed California Action should be dismissed.

In the alternative, it is within the Court's discretion to stay this action or transfer it to the Southern District of New York as another means to avoid duplicative proceedings, waste of judicial resources, and undue burden on the defendants, who will be required to engage in the same discovery in each action. *See, e.g., Alltrade, Inc.*, 946 F.2d at 629 (staying later-filed action); *Jumapao v. Washington Mutual Bank, F.A.*, No. 06-2285, 2007 WL 4258636, at *1 (S.D. Cal. Nov. 30, 2007) (transferring action to Eastern District of New York, where first-filed action was pending). As further discussed below, 28 U.S.C. § 1404 provides an additional ground for transfer of this action to New York, should the Court choose not to dismiss the action.

POINT II

ALTERNATIVELY, TRANSFER IS WARRANTED GIVEN THE IDENTITY OF FACTS, LEGAL QUESTIONS, AND PARTIES BETWEEN THIS ACTION AND THE FIRST-FILED NEW YORK ACTION

Transfer of the Third-Filed California Action to the Southern District of New York, where a nearly identical action has been pending for over four months, and where plaintiff herself filed the same action, which she then chose to dismiss, would promote judicial economy and serve the convenience of the parties and witnesses, warranting transfer under 28 U.S.C. § 1404. Under Section 1404, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The purpose of Section 1404 is to "prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Van Dusen v. Barrack*, 376 U.S. 612, 616 (1964) (internal citations and quotation omitted).

Once the threshold inquiry – whether the suit might have been brought in the transferee district – is met, Section 1404 requires the transferor court to weigh the convenience of the parties, the convenience of witnesses and the interest of justice, considering, among other factors: (1) avoidance of multiple actions; (2) the transferee district's familiarity with the governing law; (3) the feasibility of consolidation with other actions; (4) the plaintiff's choice of forum; (5) ease of access to the evidence; (6) the suit's connection to the forum; and (7) any local interest in the controversy. *See Alexander v. Franklin Resources, Inc.*, No. 06-7121, 2007 WL 518859, at *2 (N.D. Cal. Feb. 14, 2007) (transferring federal securities law action to the District of New Jersey where a similar, earlier-filed action was pending); *Jolly v. Purdue Pharma LP*, No. 05-1452, 2005 WL 2439197 (S.D. Cal. Sept. 28, 2005) (granting motion to transfer).

Here, there can be no dispute that the action might have been brought in the Southern District of New York. Indeed, plaintiff herself filed in that district, and another nearly identical action is pending there.[8] Further, as discussed below, transfer is warranted because the balance of relevant factors weighs in favor of proceeding in the Southern District of New York.

A. The Interests of Justice Warrant Transfer of This Action to the Southern District of New York, Where A Nearly Identical Action Is Pending

"To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent." *Continental Grain Co. v. The Barge FBL-585*, 364 U.S. 19, 26 (1960). Here, the First-Filed New York Action concerns the same facts, legal questions and parties as does the Third-Filed California Action. Given the near total overlap of these lawsuits, transfer of the Third-Filed California Action to the district where the earlier filed action is pending is favored, particularly because consolidation of these actions before a single

[8] Although plaintiff's counsel has raised unspecified "defects" of venue in the Southern District of New York, such objections are entirely unwarranted. Defendants have informed plaintiff's counsel that Defendants would waive any challenge to venue in the Southern District of New York as they have done in the First-Filed New York Action. Thus, plaintiff's voluntary dismissal of the Second-Filed New York Action clearly is an attempt at forum shopping which should not be countenanced.

judge would thereby be made possible. *See Van Dusen,* 376 U.S. at 612 (noting that the feasibility of consolidation weighs heavily in favor of transfer); *A.J. Indus., Inc. v. United States Dist. Ct.*, 503 F.2d 384 (9th Cir.1974) ("[T]he pendency of an action in another district is important because of the positive effects it might have in possible consolidation of discovery and convenience to witnesses and parties."). The First-Filed New York Action is already progressing through the discovery phase, and Judge Griesa has already expended time becoming familiar with the issues in the case. Accordingly, transfer to the Southern District of New York is appropriate.

B. Because Convenience Factors Do Not Favor Any Particular District, Efficiency Considerations Are Paramount, And Transfer to the Southern District of New York Is Warranted

Where, as here, the location of relevant documents and witnesses and the situs of the underlying transactions do not center in any one district, considerations of efficiency should govern. *See Alexander*, 2007 WL 518859, at *3-4. The likely witnesses and documentary evidence in this action are located in New York, New Jersey, Georgia and California. Further, because the applicable law is federal securities law, no particular district is favored based on its familiarity with governing law or its connection to the action. *Id.* at *4 (where federal securities law governed all claims, no particular district court was better suited to hear the action). Accordingly, the more important factor here is the avoidance of duplicative litigation and the attendant burden on the courts and the defendants. *Id.* at *3 (transferring California action to New Jersey where case involving same facts and parties was pending and noting that, "[w]ith respect to the convenience of the parties, appearing in a single district is more convenient than appearing in two different districts on opposite coasts of the country.").

Further, although weight is generally accorded plaintiff's choice of forum, when the plaintiff sues derivatively on behalf of a corporation, the named plaintiff's forum choice is entitled to little weight. *Lou v. Belzberg*, 834 F.2d at 739. Moreover, courts should disregard a plaintiff's choice of forum where the venue is a result of forum-shopping. *Alltrade, Inc*, 946 F.2d at 628; *see also Alexander*, 2007 WL 518859, at *4 (holding it was reasonable to infer forum-shopping where the "same plaintiff represented by the same law firm" filed a similar lawsuit in New Jersey and

later filed in California). Here, plaintiff initially chose to file suit in New York and has provided only dubious reasons why she now prefers to proceed in California. Both because of this apparent forum shopping and because plaintiff is suing derivatively on behalf of Immunosyn, plaintiff's choice of this District should be disregarded.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss this action, or, alternatively, transfer this action to the Southern District of New York or stay this action pending resolution of the first-filed New York Action, and grant such other and further relief to Defendants as the Court deems just and proper.

Dated: April 25, 2008

Respectfully submitted,

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